IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 3, 2009 Session

IN RE: THE ESTATE OF NEAL C. VAUGHAN

Appeal from the Chancery Court for Hawkins County
No. PC-4133 Thomas R. Frierson, II, Chancellor

No. E2008-02108-COA-R3-CV - FILED SEPTEMBER 30, 2009

Gary Vaughan as Executor of the Estate of Neal C. Vaughan[1] ("the Estate") filed a Petition to Construe the Last Will and Testament of Neal C. Vaughan ("the Will") naming Harold Wolfe and Carolyn Steffey as defendants. The case was tried without a jury, and the Trial Court entered an order on August 26, 2008 finding and holding, *inter alia*, that it was Neal C. Vaughan's intent to devise to Mr. Wolfe only a 43 acre tract of real property adjoining Mr. Wolfe's existing property. Mr. Wolfe appeals to this Court claiming that the Trial Court erred in holding that the Will contained a latent ambiguity, and in holding that Neal C. Vaughan intended to devise to Mr. Wolfe only the 43 acre tract. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

William E. Phillips, Rogersville, Tennessee for the Appellant, Harold Wolfe.

Allen J. Coup, Mount Carmel, Tennessee for the Appellee, Gary Vaughan.

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[1]The Last Will and Testament states that it is made by "NEAL C. VAUGHN (VAUGHAN)" and further refers to both "GARY VAUGHAN" and "Gary Vaughn" in different places within the document. For purposes of continuity only, we utilize the spelling 'Vaughan' in this Opinion as this is the spelling that appears in the Trial Court's order and in documents filed with the Trial Court.

OPINION

Background

Neal C. Vaughan ("Testator") died in May of 2005 at the age of 85. Prior to his death, Testator resided in Hawkins County, Tennessee. A petition was filed to probate the Will executed by Testator on April 22, 2005, shortly before his death. An order was entered admitting the Will to probate and Letters Testamentary were issued to Gary Vaughan, the Testator's son.

A dispute arose with regard to one of the provisions contained in the Will. Mr. Vaughan, as the Executor of the Estate, filed a Petition to Construe Will naming as defendants, Harold Wolfe, Testator's second cousin, and Carolyn Steffey, Testator's daughter. The case was tried without a jury in July of 2008.

The dispute regards a provision in the Will, which provides:

> FOURTH: I will, devise and bequeath the farm which I own in Robinette Valley, Hancock County, Tennessee, to my cousin, HAROLD WOLFE, subject to the right of Gary Vaughn and Carolyn Steffey to remove any timber within three years of the date of my death.

The residuary clause in the Will provides that after the specific bequests, the rest, residue and remainder of Testator's property is devised and bequeathed to Gary Vaughan and Carolyn Steffey per stirpes.

Real Estate Assessment Data sheets ("Tax Cards") from the Tax Assessor's Office were introduced into evidence at trial. These Tax Cards show that Testator owned two noncontiguous parcels of land in Hancock County. One of these parcels comprised approximately 198 acres[2] and the other comprised approximately 43 acres. Both were classified on the Tax Cards as agricultural. Testator had obtained a portion of his interest in both the 198 acre parcel and the 43 acre parcel by virtue of the Last Will and Testament of Almira Church. Testator gained the remainder of his fee simple interest in the property by virtue of a Quitclaim Deed given in June of 1991. Only the 43 acre parcel adjoins real property owned by Mr. Wolfe.

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[2] Mr. Wolfe's brief on appeal asserts that the Trial Court incorrectly referred to the larger parcel as comprising approximately 198 acres. Mr. Wolfe asserts that this parcel is actually two parcels, one comprised of 120 acres and another adjoining parcel comprised of 60 acres as described on the deed into Testator. Mr. Wolfe cites to Exhibits 2 and 3 from the trial in support of his assertion. Exhibit 2 is a map that shows in yellow highlighting that Testator owned two parcels in Robinette Valley, one 43.08 acre one, and a second one comprised of 198.36 acres. Exhibit 2 does not depict three separate parcels as Mr. Wolfe asserts. Exhibit 3 is the Tax Cards. One of the Tax Cards lists the deed acres at 120, and the total land units at 198.40 acres. A second Tax Card shows deed acres of 43 and total land units of 43.08 acres. Documents in the chain of title for the subject property, introduced as Exhibit 4 at trial, refer to a parcel of 120 acres, more or less; a parcel of 60 acres, more or less; and a parcel of 43 acres, more or less. The 120 acre parcel and the 60 acre parcel are contiguous and are listed on the Tax Card and map together. Given all this, we find that the Trial Court did not incorrectly reference the real property at issue in this case.

Gary Vaughan testified at trial. When asked how many farms Testator owned in Robinette Valley, Mr. Vaughan testified: "He referred to it being two.… Speaking to me as a father and son, my father referred to two different farms, one being the river farm, one being the mountain farm." When asked which parcel is the river farm, Mr. Vaughan testified it is the 198 acre tract bordering the river. He stated that Testator referred to the 43 acre parcel that adjoins Mr. Wolfe's property as the mountain farm. Mr. Vaughan stated that part of why he believes that Testator intended to leave Mr. Wolfe only the 43 acres is because the Will allows Mr. Vaughan and Ms. Steffey the right to take timber and there is no timber on the 198 acre tract. Mr. Vaughan testified that his father never referred to both parcels together as 'the farm.'

Dorothy Russell is Testator's ex-wife and the mother of Gary Vaughan and Carolyn Steffey. Years after they divorced, Ms. Russell and Testator reconciled and during the last two or three years of Testator's life, Ms. Russell saw Testator "about twice a day and sometimes more." Ms. Russell testified that when Testator was in the hospital, she "took care of all of his bills, his banking, or anything that needed to be done for him." When asked about what Testator told her with regard to farms in Robinette Valley, Ms. Russell testified:

> He would tell me he had two, and the one that was next to Mr. Wolfe - - adjoining to Mr. Wolfe, he referred to it sometimes as the little farm or maybe, if he was just talking casually, he'd say the piece of land adjoining Harold Wolfe, was the way he'd put it.

Ms. Russell testified that Testator told her that he wanted their children to have the 198 acre parcel "several times after that I refused to take it.…Well, just before he went into the nursing home the last time."

Attorney James N. Point, who was stipulated at trial to be an expert witness, drafted the Will. All of Attorney Point's contact with Testator occurred via telephone. Attorney Point had an initial telephone conversation with Testator on April 20, 2005 and another discussion on April 22, 2005. Attorney Point also recalled a third conversation he had with Testator sometime between April 20 and April 22. Testator executed the Will on April 22, 2005.

Attorney Point testified:

> The reason we were doing it by phone is he called and very specifically said he was terminal. He was dying. He was in the hospital. He did not have time to come in. He was not going to get out of the hospital and he wanted it done. I discussed with him the pitfalls of doing this by phone and he understood that and said he was willing to accept the risk, that the family would understand. It was going to be very clear. It was very simple and he wanted to have it done that way. And I had three different discussions with him which changed, by the way, some of the things that he wanted to do from my first conversation on April 20th, which again gave me some reassurance that he was competent, and he was cogent, and he knew what he was doing. And he wanted to make some changes, but he knew that he was terminal and was not coming out of the hospital.

Further, Attorney Point testified:

> There were red flags going off in my head, and that's why I'm so specific and so firm in my recollection, because I remember very clearly. The rule is being able to identify the piece of property, and I was trying to get [Testator], who knew that he was terminal - - he wanted something prepared right away. He knew that he was dying very quickly. In fact, he died, I think, less than two weeks after this was actually executed. And so I distinctly remember asking him questions. "Is there some way I can describe it? Can you give me the acreage?" "No, I cannot." "Can you give me…."

When Attorney Point was asked if he asked Testator if Testator owned any other land in Robinette Valley, Attorney Point responded that Testator said that he did own other land in Robinette Valley. Attorney Point stated:

> As I think we're all aware, trying to do these types of documents by phone has potential pitfalls with it, and so I was particularly concerned in light of my work in real estate of somehow trying to be able to identify the property that he had. And so I asked him if there was more than one piece of property and he said, "Yes," there was. And I said, "How can I identify it?" And he said, "Well, just call it the farm." And I asked him for more specifics. "Can you give me dimensions? Can you give me acreage? Can you give me something else?" And he said, "No." He said, "They'll know." He said, "It's the farm," and that's the piece of property that I was - - just "they'll know that it's the farm." And I said, "Are they going to know the difference between that and any other property?" He said, "Yes. Don't worry about it. That's the way I want to describe it." … As I recall, there was a discussion that they would know the farm because it was adjacent to some property that Mr. Wolfe had and had something to do with some access - - a lawsuit that had - - that he wanted the property to go to Mr. Wolfe because of some work they had done jointly together, or had acquired together, or something of that nature. But my understanding was it was adjacent and he wanted him to have some access to his farm by being able to go through this particular farm, as he called it, and tied up with some type of litigation involving the right-of-way over that farm.

When asked what percentage of the Estate Mr. Wolfe would receive if he received both the 43 acre parcel and the 198 acre parcel, Attorney Point testified:

> I cannot give you an exact number. It can be calculated, but what I'm looking at - - well, we're comparing apples and oranges. It would be, I'm guessing - - excuse me, not guess. It would probably be in the range of 65 percent to 75 percent, and the reason I cannot give you exact numbers, Exhibit 3 is showing me 2008 tax years for Hancock and 2005 tax years from Hawkins County. So I'm not using comparable numbers, but it would be significantly more than half of the property, which in my opinion is not consistent with the wishes of [Testator].

When asked if he believes it was consistent with Testator's intent to give the bulk of the Estate to Mr. Wolfe, Attorney Point testified:

> Absolutely not. I believe the intent of [Testator], from my discussions, was that he wanted a particular piece of property in Hancock that had some bearing, relationship, contact, whatever you wish to call it, with Harold Wolfe - - for Harold Wolfe to get that piece of property, and the rest of it to go to this children, subject to these specific monetary bequests that he had.

Attorney Point further testified:

> I thought it was clear in his mind. I thought it was clear in my mind that there were two separate pieces of property and Mr. Wolfe was to get the piece of property known as the farm to these people, that would be adjacent to Mr. Wolfe's property; yes.

When asked if there was any significance to the fact that both parcels of property are on one deed, Attorney Point stated:

> In my opinion, there's no significance. It is not uncommon, as was the case here, that when people come in, they will not have their deed. They may not recall their deed. They may recall inaccurately what's on their deed, and so it's quite common, especially in rural areas for people to refer, even if it's on one deed, to the home place, or the farm, or the woodland piece of land, or the pasture piece of land. At the time I was drafting this will, I did not have the advantage of the tax maps, did not have the advantage of the deeds, did not have the advantage of the assessment data. And [Testator] understood that and did not want - - did not feel he had time to go into all that detail. The fact to me that it appears on one deed is not telling. When he says "the farm" and I inquired of him was there some other way to define the farm or the piece of land that he wanted to go to Mr. Wolfe, and he said, "No. I don't have time for that. They will know." Those are the words he used. "They will know what he is to get." And we had some discussion about it being contiguous, or adjacent to, or combined somehow with other property that Mr. Wolfe had. My opinion is being conveyed in one deed has no relationship whatsoever or bearing on the drafting of the will or the interpretation and construction of that will.

Harold Wolfe testified that Testator referred to both parcels as the Church farm and if he wanted to pinpoint something would "say that it was on the mountain side or the ridge side." Mr. Wolfe admitted that two or three months before Testator died, Testator "told me at one time - - he did, that he was going to leave me the part of the farm next to me." Mr. Wolfe further testified that Testator never told him anything different. Mr. Wolfe admitted that although he and Testator were friends, he had never been inside Testator's home and had never been invited to come into Testator's home.

Thomas Jeffrey Winegar and Jeffrey Russell leased land from Testator to hunt upon for several years just prior to Testator's death, and both men testified that Testator told them they could hunt on the 198 acres but not the 43 acres. Both also testified that Testator referred to his land as the Church farm. They both also admitted that they only met Testator once a year when they did the lease. Mr. Winegar further stated that in addition to the once a year meeting, they also may have had a couple of phone conversations with Testator.

Lawrence Winstead, who was raised in the Robinette Valley area and lived there from approximately 1949 to 1968, testified that the property at issue in this case was referred to as the Church farm. However, Mr. Winstead admitted that it was known by this name in the 1960s and that after that time he left the area and had no more contact with it. Mr. Winstead also admitted that he never met Testator, had no idea what land Testator owned, and had no idea how Testator referred to his land.

Elmer Darrell Wright testified that he lived in the Robinette Valley area for sixteen years. Although Mr. Wright asserted that he knew Testator, when he was asked to describe Testator, Mr. Wright stated: "to be honest with you right now, that's been over 30 some years, and I couldn't tell you.… I'd seen him occasionally like that, but as far as going back and knowing what he looked like, I have no idea on that." Mr. Wright further admitted that Testator never discussed his property with Mr. Wright and that Mr. Wright based his opinion regarding the property on conversations that Testator had with Mr. Wright's grandfather. When questioned further about his knowledge of what Testator called his property, Mr. Wright insisted that he had spoken to Testator "but I can't recollect it." Further, Mr. Wright admitted that when he first was contacted with regard to this case he thought that the Newmans from Florida owned the property in question.

After trial, the Trial Court entered its Order on August 26, 2008 incorporating by reference the Trial Court's Memorandum Opinion. In the Memorandum Opinion, the Trial Court specifically found and held, *inter alia*:

> The primary issue presented for adjudication is the proper construction to be given regarding the provisions of Article Two, paragraph Fourth, of the last will and testament of Neal C. Vaughan.
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> * * *
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> Mr. Neal C. Vaughan died a citizen and resident of Hawkins County, Tennessee, on May 4, 2005. At the time of his death, he was survived by his son, Gary Vaughan, and his daughter, Carolyn Steffey. The Defendant Mr. Wolfe is a cousin of the testator.
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> At the time of his death, Mr. Vaughan was the owner in fee simple of several parcels of real property in both Hawkins and Hancock Counties. At issue in the action *sub judice* are two parcels of real estate located in Hancock County, Tennessee. One tract, containing approximately 43 acres, adjoins real property

owned by Mr. Wolfe. The other tract, containing approximately 198 acres, is property along the Clinch River with road frontage along Robinette Valley Road.

The evidence preponderates in favor of a finding that Mr. Vaughan was an honest, private and frugal gentleman. Many of his financial affairs were handled by his former wife, Ms. Dorothy Russell. In 2005, Mr. Gary Vaughan contacted Attorney Jim Point to draft a last will and testament for his father. According to the testimony of Mr. Point, his communication with the testator, which was exclusively by telephone, began on April 20, 2005. At the time, Mr. Vaughan was terminally ill. In connection with his drafting of the testamentary instrument, Mr. Point did not possess a tax map, any deeds or deed descriptions. Relevant to the instant action, Mr. Vaughan's instructions included leaving "the farm" to Mr. Wolfe. When asked by Mr. Point for a more specific reference to particular property, the testator indicated that there did not exist sufficient time to provide same and that "they" would know what property was to be devised to Mr. Wolfe. Mr. Vaughan executed his last will and testament on April 22, 2005.

* * *

The Court has considered the testimony of parties and witnesses, including the testimony of Mr. Point who indicated that in his opinion the testator intended that Mr. Wolfe receive the 43 acre tract adjoining the Wolfe property. This Court determines that considering the specific language of the will, the context in which the words are used and the general scope and purposes of the will considered in light of the surrounding and attending circumstances, Mr. Vaughan's reference to "the farm which I own in Robinette Valley, Hancock County, Tennessee" was intended to devise to his cousin, Harold Wolfe, the 43 acre tract adjoining existing property of Mr. Wolfe. This determination is further supported by the fact that reference in the will was made to the rights of Mr. Gary Vaughan and Carolyn Steffey to remove timber within three years from the date of Mr. Vaughan's death. The evidence preponderates in favor of a finding that the 198 acre tract did not contain removable timber. Further, a conveyance of the 198 acre tract to Mr. Wolfe would result in his receiving approximately 70% of the total estate assets.

Based upon the foregoing analysis, this Court concludes that pursuant to the last will and testament of Neal C. Vaughan, the Defendant Harold Wolfe is entitled to be awarded the 43 acre tract located in Hancock County, Tennessee adjoining his existing property. The 198 acre tract located in Hancock County, Tennessee shall pass pursuant to the residuary clause of Mr. Vaughan's will.

(footnotes omitted).

Mr. Wolfe appeals to this Court.

Discussion

Although not stated exactly as such, Mr. Wolfe raises the following issues on appeal: 1) whether the Trial Court erred in holding that the Will contains a latent ambiguity; and, 2) whether the Trial Court erred in finding that Testator's intent was to devise only the 43 acre tract to Mr. Wolfe.

This Court discussed the standard of review to be applied in cases involving the construction of a will in *Horadam v. Stewart* stating:

> The construction of a will is a question of law for the court; therefore, we review the trial court's conclusions of law *de novo* affording them no presumption of correctness. *In re Estate of Milam*, 181 S.W.3d 344, 353 (Tenn. Ct. App. 2005). In cases involving the construction of wills, the cardinal rule "is that the court shall seek to discover the intention of the testator, and will give effect to [that intent] unless it contravenes some rule of law or public policy." *Stickley v. Carmichael*, 850 S.W.2d 127, 132 (Tenn. 1992) (quoting *Bell v. Shannon*, 212 Tenn. 28, 367 S.W.2d 761, 766 (Tenn. 1963)); *see also In re Crowell*, 154 S.W.3d 556, 559 (Tenn. Ct. App. 2004); *McBride v. Sumrow*, 181 S.W.3d 666, 669 (Tenn. Ct. App. 2005). Furthermore, in will construction cases, we rely on the language of the instrument to determine the testator's intent:
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> > [T]he testator's intention must be ascertained from "that which he has written" in the will, and not from what he "may be supposed to have intended to do," and extrinsic evidence of the condition, situation and surroundings of the testator himself may be considered only as aids in the interpretation of the language used by the testator, and "the testator's intention must ultimately be determined from the language of the instrument weighed in the light of the testator's surroundings, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention not justified by the language of the writing itself."
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> *In re Cromwell*, 154 S.W.3d at 559 (quoting *Nichols v. Todd*, 20 Tenn. App. 564, 101 S.W.2d 486, 490 (Tenn. Ct. App. 1936)); *see also* Pritchard on Wills §§ 384, 387, 388, and 409 (2d. ed.). Our Supreme Court has said that when ascertaining the testator's intent by construing the language used in a will, we must consider the entire will as a whole. *In re Estate of Vincent*, 98 S.W.3d 146, 150 (Tenn. 2003).

Horadam v. Stewart, M2007-00046-COA-R3-CV, 2008 Tenn. App. LEXIS 601, at **13-15 (Tenn. Ct. App. Oct. 6, 2008), *Rule 11 appl. denied April 27, 2009*.

We first address whether the Trial Court erred in holding that the Will contains a latent ambiguity. "Generally, parol or extrinsic evidence may not be used to vary, contradict, or add to unambiguous language used in a will," however, such evidence may be used if the will contains

a latent ambiguity. *Horadam*, 2008 Tenn. App. LEXIS 601, at *15. As this Court explained in *Horadam*:

> An ambiguity is "[a]n uncertainty of meaning or intention, as in a contractual term or statutory provision."… Our courts have routinely held that a latent ambiguity exists when "the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer[.]" Moreover, a latent ambiguity is "susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of."
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> Simply defined, a latent ambiguity is "[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Latent ambiguities most often arise in relation to the person and the thing identified in the document and "exist when the words of a written instrument are plain and intelligible, yet have capability of multiple meanings given extraneous facts." For example, a latent ambiguity regarding the subject or thing would arise if a testator devises a parcel of his property "X" but has two parcels, "North X" and "South X." Extrinsic evidence is then admissible to identify the property or person the testator intended to describe.
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> Alternatively, a patent ambiguity exists when the ambiguity results from the language or wording in the instrument. A patent ambiguity is one that clearly appears on the face of a document, "[p]roduced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful … sense without adding ideas which the actual words will not themselves sustain."

Horadam, 2008 Tenn App. LEXIS 601, at **15-19 (citations omitted) (italics in original omitted).

Mr. Wolfe argues on appeal that the Will contains no latent ambiguity. We disagree, as did the Trial Court. Although provision "FOURTH" in the Will refers to "the farm which I own in Robinette Valley, Hancock County, Tennessee," the evidence shows that Testator owned two separate parcels of land in Robinette Valley, which the Tax Cards show are both categorized as agricultural. In addition, several witnesses testified that Testator owned two farms in Robinette Valley. The situation in the case now before us is very similar to the 'North X' and 'South X' hypothetical discussed in *Horadam*. *Id*. at *18.

We find, as did the Trial Court, that a latent ambiguity with regard to the phrase 'the farm' arises not "from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer[.]" *Id*. at *17. This ambiguity is "susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the

ordinary or legal sense of the words and phrases made use of." *Id*. As such, we find that the Trial Court did not err in holding that the Will contained a latent ambiguity and, therefore, in allowing parol evidence for the explanation of this latent ambiguity.

We next consider whether the Trial Court erred in finding that Testator's intent was to devise only the 43 acre tract to Mr. Wolfe. If a testator's intent is determined, in part, through extrinsic evidence, we review the trial court's findings of fact *de novo* with a presumption of correctness. *In re: Estate of Luther Gaston Garrett*, No. M1999-01282-COA-R3-CV, 2001 Tenn. App. LEXIS 764 (Tenn. Ct. App. Oct. 12, 2001), *no appl. perm. appeal filed*.

In its Memorandum Opinion, the Trial Court specifically found that Testator owned two parcels of real property in Hancock County, one containing 43 acres that adjoined Mr. Wolfe's property, and one containing 198 acres. The evidence does not preponderate against this finding.

Further, the evidence in the record on appeal shows that shortly before he executed his Will, Testator told Mr. Wolfe that Testator was leaving the 43 acre parcel to Mr. Wolfe. Testator never told Mr. Wolfe anything different. The evidence shows that when Attorney Point spoke with Testator regarding the drafting of the Will, Attorney Point specifically asked Testator if "the farm" was the only real property Testator owned in Robinette Valley. Attorney Point testified that Testator told him that he did own more land in Robinette Valley in addition to the farm he was leaving to Mr. Wolfe. Attorney Point also testified that it is his opinion as the drafter of the Will that Testator intended to give Mr. Wolfe only the parcel of land which adjoins Mr. Wolfe's property and that it would not be consistent with Testator's intent for Mr. Wolfe to get the bulk of the Estate by getting both the 43 acre parcel and the 198 acre parcel. Gary Vaughan and Dorothy Russell both testified that Testator referred to his property as being two farms. Ms. Russell also testified that Testator told her shortly before he went into the nursing home for the last time that he wanted their children to have the 198 acre parcel. Although Thomas Winegar and Jeffrey Russell both testified that Testator referred to his property as the Church farm, both admitted they had very limited contact with Testator.

The evidence in the record on appeal does not preponderate against the Trial Court's findings and holding that Testator intended to devise and bequeath to Mr. Wolfe only the 43 acre parcel. We, therefore, affirm the Trial Court's August 26, 2008 order.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Harold Wolfe and his surety.

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D. MICHAEL SWINEY, JUDGE